SIA GEOK HEE & 8 ORS.

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, KUALA LUMPUR
TUAN HASHIM BIN DATO' HAJI YUSOFF J
[CRIMINAL APPEAL NO. 41-144-94]
14 DECEMBER 1994

***CRIMINAL PROCEDURE**: Prosecution - Prosecution required consent in writing of Public Prosecutor - Section 27C (1) & (2) Police Act 1967 - Section 129(1)(b) Criminal Procedure Code - Whether want of consent curable or a nullity - Section 422 Criminal Procedure Code - Whether want of sanction occasioned a failure of justice.*

***CRIMINAL PROCEDURE**: Form of charge - Whether charge contained particulars of the manner in which alleged offence was committed - Whether acccused embarasssed or prejudiced or misled - Whether technical irregularity occasioned a miscarriage of justice - Section 156(1)(b) Criminal Procedure Code.*

***CRIMINAL PROCEDURE**: Refusal by subsequent Magistrate to allow recall of prosecution witnesses on application of accused - Whether accused materially prejudiced - Whether there ought to be a retrial - Section 261 Criminal Procedure Code.*

In this case nine accused were charged with illegal assembly and obstructing police officers in the course of duty under s. 28(8) of the Police Act 1967 and s. 186 of the Penal Code respectively. Eight of the accused were sentenced to one (1) day imprisonment and RM3,000 fine in default 8 months' imprisonment, while the ninth accused was fined RM3,000 in default 8 months' imprisonment on the 1st charge and RM1,000 in default 4 months' imprisonment on the 2nd charge. All the accused had been seen carrying banners and distributing pamphlets and had refused to cooperate with the police when their identity cards were requested. They had locked themselves in a van and were finally pulled out after much persuasion. It was not disputed that no police permit was obtained for the gathering. The case was heard by a different Magistrate after PW4 gave evidence until the final disposal.

The accused appealed to the High Court on the grounds *inter alia*, (i) that the 1st charge was a nullity as no written consent of the Public Prosecutor was tendered under s. 27C(1) of the Police Act 1967 (ii) that the 2nd charge did not contain such particulars of the manner in which the alleged offence was committed contrary to s. 154 illustration (d) of the Criminal Procedure Code (CPC) (iii) that the learned Magistrate failed to comply with s. 261 of the CPC when she refused the appellants' requests to recall the prosecution witnesses heard by the earlier Magistrate. The learned Deputy Public Prosecutor (DPP) indicated that the 2nd charge also required consent of the Public Prosecutor under s. 129(1)(b) of the CPC but argued that such want of sanction for both charges did not occassion a failure of justice and was curable. The learned DPP also urged the Court to order a retrial.

Held:

[1] It was the duty of the Prosecuting Officer and the trial Magistrate to ensure that s. 27 C(1) & (2) of the Police Act 1967 are complied with before proceeding with the trial. The case was not conducted by a DPP and the non-production of the requisite consent rendered the trial under the 1st charge a nullity.

[2] The want of sanction for the 2nd charge did not occassion a failure of justice.

[3] Even though the 2nd charge does not comply with s. 154 illustration (d) of the CPC, it is provided by s. 156 of the CPC that the error or omission to state the particulars shall not be regarded as material unless the accused was in fact misled by such error or omission. On the facts, the appellants were never misled, embarrassed or prejudiced and the technical irregularity did not occassion a miscarriage of justice.

[4] The refusal of the subsequent Magistrate to allow recall of prosecution witnesses materially prejudiced the appellants as the request was made after their Counsel had discharged himself.

[5] Even though the prosecution could not be blamed for the trial Court's refusal to allow recall of witnesses, the period of detention and the fact that they are first offenders is punishment enough. An order for retrial would not serve the cause of justice.

[Appeal allowed. Convictions against all appellants set aside].

Cases referred to:
Lee Chwee Kiok v. PP [1979] 1 MLJ 45 ***(refd)***
Lyn Hong Yap v. PP [1956] MLJ 226 ***(refd)***
PP v. Mohd Halipah [1982] 1 MLJ 155 ***(refd)***
Joginder Singh v. PP [1984] 2 MLJ 133 ***(refd)***
Khoo Kay Jin v. PP [1964] 30 MLJ 22 ***(refd)***
Mahadi v. PP [1970] 1 MLJ 16 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 117, 129(1)(b), 154(d), 156, 156(b), 257(i), 261, 261(b), 325(1) & 422
Penal Code, s. 186
Police Act 1967 s. 27(8), 27C(1) & (2)
Prevention of Corruption Act, 1961, s. 9(ii)

For the appellant - in person
For the respondent - Ridzuan bin Zainal, DPP

JUDGMENT

Hashim bin Dato' Haji Yusoff JC:

This is an appeal by the appellants against their conviction and sentence under s. 27(8) of the Police Act 1967 (the 1st-charge) and s. 186 of the Penal Code (the 2nd charge) whereby appellants No. 1-8 were sentenced to 1 day imprisonment and a fine of RM3,000 in default 8 months imprisonment and appellants No. 9 to a fine of RM3,000 in default 8 months imprisonment for the first charge and a fine of RM1,000 in default 4 months each on the 2nd charge.

The brief facts of the prosecution case as adduced by the evidence are as follows:

> On 1 March 1991 at about 8.40 p.m. PW4 and three other police personnel went to the scene at Jalan Changkat, Bukit Bintang, Kuala Lumpur whereupon they saw the 9 appellants in a group at a particular place carrying banners and distributing phamplets. One of them, the 1st appellant, was also talking in English and Chinese through the microphone. PW4 and his colleagues observed the appellants for about 15 minutes before they decided to approach them. Upon seeing the police party, all the appellants withdrew from the scene and got into a van. PW4 then stopped the van and asked all the appellants to produce their Identity Cards which they refused to give. All the appellants refused to co-operate and instead locked the doors of the van and started singing inside. PW4 called for his superior PW6 who also tried in vain to get the co-operation of the appellants. Eventually when another senior officer arrived at scene

and after about an hour of discussion with the appellants, they (appellants) opened the van door and were pulled out from the van after their refusal to come out of the van as requested by the Police.

It was not disputed that no police permit was obtained for this gathering. The learned Magistrate said there was a *prima facie* case made out against all the appellants on the 2 charges and called for their defence. The defence case basically denied the allegation made by the prosecution witnesses. They denied there was an assembly or that they obstructed the Police at the scene of the alleged offence. They also expressed their religious sentiments and that they were there that night on a special mission to preach their faith. Except for appellant No. 1 the rest of the appellants all gave evidence from the dock.

Before I go into the issues raised in the appeal it is also significant to note that this case was originally heard by the Magistrate Encik Aslam bin Zainuddin (the first Magistrate). It would appear from the record that after PW4's evidence, the case was continued to be heard before another Magistrate Puan Reihana bt Abdul Razak (the second Magistrate). (See p. 35 of the record of appeal) from 9 June 1992 until its final disposal on 7 May 1994.

Let me now go into the issues raised by the appellants:

Regarding the First Charge:

On the 1st charge, regarding the issue of consent, reference has been made to s. 27C(1) of the Police Act 1967 which reads:

A prosecution for an offence under s. 27 or 27A shall not be instituted except with the consent in writing of the Public Prosecutor, but a person who is to be charged with the offence may be arrested, or a warrant for his arrest may be issued and executed, and he may be remanded in custody or released on bail notwithstanding that the consent of the Public Prosecutor (PP) to the institution of prosecution for the offence has not been obtained, but the case shall not be further prosecuted until the consent has been obtained.

In the case of *Lee Chwee Kiok* [1979] 1 MLJ 45, Harun J (as he then was)

Held: (1) that the trial was a nullity as the PP had not given his consent on the amended change.

Also in the case of *Lyn Hong Yap v. PP* [1956] MLJ 226 the Court of Appeal

Held: that the want of consent under the provision of Prevention of Corruption Ordinance is not an omission that can be cured by reason of s. 422 of the Criminal Procedure Code (CPC).

However, in *PP v. Mohd Halipah* [1982] 1 MLJ 155 Yusoff Abdul Rashid J

Held (3) .. as the prosecution was conducted by the DPP the consent of the PP was implicit and the Court had jurisdiction to try the case

Although the appellants are confined to their joint petition of appeal which did not include the question of consent, and it was not earlier raised as a preliminary objection by the appellants' Counsel at the beginning of the trial in the Court below, I think it was the duty of the Prosecuting Officer and the Magistrate conducting the trial to ensure that the provision of s. 27C(1) & (2) of the Police Act 1967, were complied with, before proceeding with the trial. In this case the prosecution was not conducted by a Deputy Public Prosecutor and the non production of the requisite consent therefore rendered the trial under the first charge, a nullity. In this instance I would exercise my revisionary powers under s. 325(1) of the Criminal Procedure Code (CPC) and quash the conviction and set aside the sentence against all the 9 appellants under the 1st charge. Any fine, if paid, is to be refunded.

Regarding the Second Charge

Although the appellants did not raise the issue of sanction in their submission through the 1st appellant Sia Geok Hee, the learned DPP, like a true officer of the Court, indicated that the 2nd charge under s. 186 of the Penal Code (PC) likewise requires the sanction of the PP under the provision of s. 129(1)(b) of the CPC.

The learned DPP however submitted that the failure to get the sanction was an omission which is curable under s. 422 of the CPC and in support of his argument referred to the case of *Joginder Singh v. PP* [1984] 2 MLJ 133 whereby Ajaib Singh J, (as the then was).

> Held: (1) By virtue of the provision of s. 422 of the CPC, the conviction of the appellants in the Sessions Court shall not be set aside unless it can be shown that the want of sanction has occasioned a failure of justice.

In the instant case the appellants were initially represented by Counsel at the outset of the trial. No preliminary objection was raised before the Magistrate regarding the want of sanction on the 2nd charge. As such, after reviewing the case as a whole, I find there is not the slightest suggestion whatsoever that the want of sanction has occasioned a failure of justice.

Next, I have to consider the other ground of appeal raised by the appellants regarding the 2nd charge which can be summarised as follows:

(i) that the 2nd charge did not contain such particulars of the manner in which the alleged offence was committed as will be sufficient for the purpose.

(ii) that the prosecution failed to prove the ingredients of s. 186 of the Penal Code.

(iii) that the learned Magistrate failed to comply with the provision of s. 257(i) of the CPC in not explaining the case of the prosecution to the undefended accused.

(iv) that the learned Magistrate failed to comply with s. 261 of the CPC on the ground that she disallowed the appellants' requests to re-summon the witnesses of the prosecution;

(v) that there has been a misjoinder of charges. On the issue of the defective 2nd charge, the appellants referred to the case of *Khoo Kay Jin v. PP* [1964] 30 MLJ 22, where it was held that a charge for cheating is defective if it does not specify deception which has been practised.

Looking at s. 154 of the CPC and in particular illustration (d) which sets out that

> if A is accused of obstructing B a public servant in the discharge of his public functions at a given time and place, the charge must set out the manner in which A obstructed B in the discharge of his function.

In the instant case the 2nd charge reads as follows:

> Bahawa kamu bersma-sama pada 1 March 1992 jam lebih kurang 8.40 malam hingga jam 12.00 malam, di Jalan Cangkat Bukit Bintang, di dalam Bandaraya Kuala Lumpur Wilayah Persekutuan telah didapati dengan sengaja menghalang Konst. 651114 Mohd. Narri bin Mohd. Ariffin dan empat pejawat awam yang lain pada menjalankan kerja-kerja jawatannya dan olih yang demikian telah melakukan satu kesalahan di bawah Sek. 186 K/K dan boleh dihukum di bawah Seksyen yang sama.

The charge did not set out the manner which the appellants obstructed PW4 Constable 65114 Mohd Nazri b. Mohd Ariffin and other public servants in the discharge of their functions.

But s. 156 CPC states that:

> no error in stating either the offence or the particulars required to be stated in the charge and no omission to state the offence or those particulars shall be regarded, at any stage of the case is material unless the accused was in fact misled by such error or omission.

Illustration (b) to s. 156 of the CPC sets out that if:

> A is charged with cheating B and the manner in which he cheated B is not set out in the charge, or is set out incorrectly and A defends himself, calls witnesses, and gives his own account of the transaction, then the Court may infer from this that the omission to set out the manner of the cheating is not material.

In the circumstances of the instant case, I hold that the appellants were not in fact embarrassed or prejudiced and that the technical irregularity did not occasion a miscarriage of justice. They were never misled by the error. They defended themselves and gave their own account of what had happened at the material time. They knew what the charge was all about.

Next, on the question of noncompliance with s. 261 of the CPC, had the refusal by the subsequent Magistrate to recall witnesses at the request of the appellants materially prejudiced the appellants?

It would appear from the evidence in the instant case that the appellants requested to recall the prosecution witnesses after their Counsel had discharged himself. However, their application was rejected by the learned Magistrate. Under the circumstances, I hold that the appellants were materially prejudiced when the second Magistrate refused to allow their said application. I therefore set aside the conviction against them by virtue of s. 261(b) of the CPC. Any fine, if paid is to be refunded.

Finally, 1 have to decide whether there should be a retrial. The learned DPP urged the Court to order a retrial and referred to the case of *Mahadi v. PP* [1970] 1 MLJ 16 where it was held by Chang Ming Tat J (as he then was) in ordering a retrial:

> that where the prosecution has adduced all the evidence it has and the evidence has established a *prime facie* case against the accused, which if unrebutted would warrant his convinction, then the failure of justice occasioned by the trial President placing the wrong burden of proof on the accused cannot be laid to the door of the prosecution.

In the instant case, the Learned DPP argued, and I think rightfully so, that the prosecution is not to the blamed for the Court's refusal to recall witneses at the request of the appellants. However, *Mahadi's* case, *supra*, was one under s. 9(ii) of the Prevention of Corruption Act, 1961. In the instant case the 2nd charge against the appellants was under s. 186 of the Penal Code which provides for a maximum punishment of 3 months imprisonment or with fine which may extend to RM1,000 or with both.

From the notes of the proceedings and the evidence, the appellants were already arrested and detained under s. 117 of the Criminal Procedure Code from between eleven to fourteen days. Under the circumstances, that period of detention, for first offenders like the appellants, would have been, I feel, punishment enough. As such, an order for a retrial would not serve the cause of justice and I accordingly make no such order.